T-West Sales and Service, Inc. d/b/a Desert Toyota *and* International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO. Case 28–CA–20207

December 23, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 24, 2005, Administrative Law Judge William G. Kocol issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs. The Respondent filed an answering brief; the General Counsel filed a reply. The Respondent also filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has considered the decision in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The recommended Order of the Administrative Law Judge is adopted and the complaint is dismissed.

Joel C. Schochet, Esq., for the General Counsel.
Douglas R. Sullenberger, Esq. (Fisher & Phillips, LLP), of Atlanta, Georgia, for the Respondent.
Don C. Whitaker, Grand Lodge Representative, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on June 29, 2005. The charge and first amended charge were filed on March 22 and May 25, 2005,[1] respectively, and the complaint was issued May 27.

The complaint alleges that T-West Sales & Service, Inc. d/b/a Desert Toyota (Respondent) violated Section 8(a)(5) and (1) of the Act by changing its 401(k) benefits and fees for employees represented by the International Association of Machinists and Aerospace Workers, Local Lodge 845, AFL–CIO (the Union) without first giving the Union an opportunity to bargain about the changes. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) by delaying in providing information requested by the Union. Respondent filed a timely answer that, among other things, denied it had violated the Act.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent, and the Union,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is engaged in business of new car sales and service at its facility in Las Vegas, Nevada, where it annually derives gross revenues in excess of $500,000 and purchases and receives goods values in excess of $50,000 directly from points located outside the State of Nevada. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

This is the fourth in a series of unfair labor practice proceedings against Respondent. On November 13, 2002, Judge Lana H. Parke issued a decision finding that Respondent violated Section 8(a)(1) and (3) of the Act. Judge Parke concluded that those unfair labor practices were serious enough to warrant the imposition of a bargaining order against Respondent. Exceptions were filed and the Board has yet to issue its decision in that case. On December 3, 2003, Judge Albert A. Metz issued a decision concluding that Respondent violated Section 8(a)(1), (3), (4), and (5). On February 20, 2004, Judge Larry R. Hicks of the United States District Court for the District of Nevada granted an injunction against Respondent under Section 10(j) of the Act. Among other things, Judge Hicks ordered Respondent to recognize and bargain with the Union as the bargaining representative of the unit employees and to promptly provide the Union with all relevant and necessary information. Later, Judge Metz issued another decision concluding that Respondent again violated Section 8(a)(5). The allegations in the case before me hinge upon the validity of the bargaining order in Judge Parke's case.

Don C. Whitaker is grand lodge representative for the International Association of Machinists and Aerospace Workers, AFL–CIO. He served as the Union's representative in bargaining with Respondent. With Whitaker at the bargaining table for the Union were bargaining unit employees Phil Albano and Mario Portillo. Jorge Gonzalez is director of human relations for AutoNation, Inc. He is responsible for negotiating collec-

[1] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(5) and (1) of the Act when it (1) refused to provide information on various dates between November 2004 and March 2005, and (2) unilaterally changed the matching contributions for employees enrolled in its 401(k) plan, we do not rely on the analysis set forth in his decision. Rather, in light of our reversal of the bargaining order recommended in *Desert Toyota*, 346 NLRB 118 (2005), we find that the Respondent did not have an obligation to bargain with the Union as the exclusive collective-bargaining representative of its employees.

Member Liebman dissented from the denial of a bargaining order in the earlier case, but agrees that the Board majority's decision there is dispositive here.

[1] All dates are from June 30, 2004, to June 20, 2005, unless otherwise indicated.

[2] I find it unnecessary to rely on GC Exh. 21 in reaching a decision in this matter. See ALJ Exhs. 1–4.

[3] After the hearing closed, David A. Rosenfeld, Esq. (Weinberg, Roger, & Rosenfeld), of Alameda, California, entered an appearance on behalf of the Union.

tive-bargaining agreements throughout that company; he represented Respondent in its negotiations with the Union.[4] Layla Holt is human resources manager for AutoNation; she was a member of the negotiating team and was responsible for taking notes for Respondent. Negotiations began between Respondent and the Union in April 2004 and have continued to the time of the hearing in this case. During this same time period Whitaker and Gonzales were also involved in collective-bargaining negotiations for Power Ford of Torrance; Power Ford is located in California. AutoNation is the parent company to both Respondent and Power Ford. Significant to this case is the fact that both Power Ford and Respondent participated in the 401(k) plan offered by AutoNation. It is important to note that AutoNation is not named as a respondent in the complaint. By at least July 29, 2004, Respondent had supplied Whitaker with the summary plan description for AutoNation's 401(k) program. The summary plan document dated March 2004 states the following:

> The Company has the discretion to charge all or a portion of certain Plan administrative expenses to your Account. Examples of such administrative expenses include recording costs, proxy fees and other fees associated with maintaining your Account under the Plan.
>
> . . . .
>
> [T]he Company has reserved the right to amend any and all provisions of the Plan, stop its contributions to the Plan, or terminate the Plan at any time in the future.

It did not contain any description of specific fees or costs charged to participants in the plan. There are about 30 employees in the bargaining unit 8 or 9 of whom have opted to participate in the 401(k) plan.

B. Alleged Violations

On October 29, AutoNation's 401(k) plan was amended to reduce the employer's matching contribution from 50 percent of the first 4 percent of eligible compensation that an employee contributes to 50 percent of the first 2 percent of eligible compensation that an employee contributes. The plan was also amended so that a participant's account could be assessed for and reduced by any of the following fees:

- Distribution check fees.
- In-kind distribution stock certificate fee.
- Qualified Domestic Relations Order processing fee.
- Per participant recordkeeping fee (terminated participants only).
- Postage fees for statements and confirmation statements (terminated participants only).
- Asset charge/trusteee's fees (terminated participants only).

Respondent had nothing to do with the decision to change the 401(k) plan.

On November 9, AutoNation sent a letter addressed to the 401(k) participants. The letter indicated that there would be changes to the plan effective January 1. Significantly, the letter stated:

> Also, effective January 1, 2005, the company match will be 50% of the first 2% of eligible compensation that an associate contributes. This is a change from the current 50% of the first 4% of eligible compensation that an associate contributes. Although this will result in a reduced total match for certain associates, the company match continues to be a great benefit as well as an additional incentive for retirement savings.

The letter made no mention of any change in fees. Whitaker, however, did not see this document until the day of the hearing in this case.

On November 30, Gonzalez and Whitaker were involved in bargaining concerning Power Ford. Near the end of the meeting that day Gonzalez informed Whitaker that there would be a change made in the Company's 401(k) plan. Gonzalez informed Whitaker that he knew that at the very least the Company was looking at cutting its matching contribution in half effective January 1. Gonzalez said that there could be other changes, but he was not sure. Gonzalez also informed Whitaker that he (Gonzalez) had not been consulted about this matter. Gonzalez did not mention the November 9 letter. Whitaker replied that he thought this would be a major unilateral change in benefits and that he wanted all documents pertaining to any changes that were being proposed on January 1 for the 401(k) plan. Whitaker continued that he wanted to review the documents so he could respond and that they should not make any change to the plan until he had the documentation and a chance to bargain over the change. Gonzalez said he would see what he could do. Gonzalez admitted that on November 30 he was aware that a prior communication had been sent to employees on the 401(k) changes and his bargaining notes support that admission.

After the November 30 meeting, Gonzalez contacted Maureen Redman, AutoNation's benefits director. Redman provided Gonzalez with a copy of the November 9 letter. She explained that the employee benefits committee had approved the change earlier in October. Gonzalez also spoke with Coleman Edwards, AutoNation's deputy general counsel. Gonzalez asked Edwards if they could change the 401(k) plan back to the greater employer match amount, and Edwards said no.

Respondent and the Union next met for bargaining on December 7, 8, and 9. On December 8, Respondent presented the Union with a contract proposal that indicated that the portion covering benefits, pension, and 401(k) were to be provided later by Respondent as part of its economic proposal. On December 17, Whitaker wrote Gonzalez a letter complaining of Gonzalez' unwillingness to schedule more bargaining sessions; that letter did not refer to the 401(k) matter.

On December 22, AutoNation sent a letter addressed to AutoNation Associates. The letter announced that effective January 1 changes would take effect for the AutoNation 401(k) plan, including "The match will be changing from 50 percent up to 4 percent of eligible compensation to 50 percent up to 2

[4] At the hearing, I allowed Respondent to amend its answer to deny that Gonzalez was an agent of Respondent. The facts set forth below clearly belie this denial and I conclude that Gonzalez was Respondent's agent for purposes of negotiating a collective-bargaining agreement with the Union.

percent of eligible compensation." The letter also described fees that would be assessed to employees as follows.

- Distribution check fees—$25
- In-kind distribution stock certificate fee—$30.
- Qualified Domestic Relations Order processing fee—$400, $200 deducted from the employee's account and $200 deducted from the alternate payee's account.
- Per participant recordkeeping fee—$10 annual fee (terminated participants only).
- Postage fees for statements and confirmation statements—a quarterly fee of an unspecified amount but which can be avoided using online transactions (terminated participants only).
- Asset charge/trusteee's fees—a quarterly fee of an unspecified amount (terminated participants only).

On January 1, the changes concerning the matching contributions in the 401(k) plan were implemented for all 401(k) participants including Respondent's unit employees. At that time Whitaker had not received any of the written information he had requested concerning the changes, nor had there been any bargaining on the changes. Gonzalez admitted that at this point the parties had not reached impasse in bargaining on this matter.

Whitaker and Gonzalez met on January 13 for the Power Ford negotiations. In preparation for that meeting Whitaker had prepared three points in writing on his note pad. The second point was that he trusted that Respondent has not made any unilateral changes concerning the 401(k). When Whitaker asked this question, Gonzalez answered that nothing had been changed other than the company match and that he would get Whitaker the information they may have. Gonzalez also stated that the only other change was concerning the fees when withdrawals are made. Gonzalez indicated that he understood that this was a mandatory subject of bargaining. Whitaker still had not received any of the documents he had requested.

On January 25 Gonzalez sent Whitaker a letter that dealt with a number of matters. It stated that enclosed was:

> The document we also referenced at the negotiations from AutoNation's 401(k) Plan Administrator, regarding the change in the employer match and other minor changes.

Attached was the December 22 letter set forth above. Whitaker replied by letter the next day. In his letter Whitaker recounted:

> As you will recall, on Tuesday, November 30, 2004, at the close of our negotiations for the above-subject company, you informed me that there were to be changes made in the Company 401(k) plan. As a result of your comments, I asked you to provide me with any and all documents and/or announcements of changes.
>
> At this time, I informed you that any changes in the 401(k) plan concerning bargaining unit employees was a mandatory subject of bargaining and that no changes should be made unilaterally until such time as I was afforded the opportunity to review said changes and negotiate over any changes. You informed me that you would forward to me this material.
>
> I did not receive any additional information from you regarding this announced change during the month of December 2004. Therefore, on Thursday, January 13, 2005, I requested that you provide me with any information and/or documentation regarding any changes in the 401(k) plan. During this discussion you informed me that you were not aware of any notification that was available. You mentioned that you thought there may have been an email that you had reviewed and that you would respond to my request.
>
> In reviewing your letter of January 25, 2005, I find an attachment dated December 22, 2004, that is addressed to AutoNation's Associates. I have since obtained a copy of this document from bargaining unit employees at Power Ford.
>
> I trust you have informed those people in your company responsible for maintaining the 401(k) plan that no changes to the 401(k) plan provided to the bargaining unit employees at Power Ford Torrance is to be implemented prior to your meeting the Company's obligation to negotiate over this change.Therefore, I must demand that you show proof that this plan has not been changed for those bargaining unit employees working at Power Ford Torrance. Any such change(s) to this plan will be considered an unfair labor practice.

On January 26, Whitaker sent Gonzalez a similar letter concerning the changes to the 401(k) plan as they pertained to the Respondent's bargaining unit employees.

On February 23, Whitaker sent Gonzalez another letter. In that letter Whitaker again recounted the history of the 401(k) issue as he saw it. This time Whitaker added:

> It is now my understanding that your company put out the aforementioned December 22, 2004 communication to bargaining unit employees at Power Ford Torrance and at Desert Toyota, Las Vegas. I find this fact to be disturbing due to the fact that you did not send this announcement to me until my second raising of the issue, even though you are aware that such changes are a matter of mandatory negotiations, and the fact that I had requested this information as far back as November 2004.
>
> Your delay in providing the above-referenced information, and the fact that you continue to take the position that you will not negotiate over economic issues such as the 401(k) Plan until all non-economic proposals are resolved, only demonstrates your bad faith intentions to bargain in good faith.
>
> Therefore, as a second request, I must insist that you provide me with copies of all information concerning 2005 contributions paid by the company as a match to employee contributions immediately. I also demand you cease any changes you may have unilaterally implemented concerning the 401(k) Plan. In addition, I am demanding that you arrange to meet with me immediately to provide said information and negotiate over such changes.

On March 7 Whitaker again corresponded with Gonzalez. In that letter Whitaker asserted that he had not yet received the information he had requested concerning the 401(k) matter.

Respondent and the Union met for contract negotiations again on March 8, 9, and 10. On March 8, Gonzalez said he wanted to clarify Respondent's position on the 401(k) plan. Gonzalez said that the plan covered 24,000 employees throughout AutoNation and they could not make changes to the plan just for the bargaining unit employees at Respondent and Power Ford. He said the plan could not treat the groups differently. Gonzalez also said that there had not been a unilateral change because there was a history of changes made to the plan. Gonzalez offered to bargain over the changes that had been made and over their effects. Whitaker answered that he thought that the bargaining unit employees could be treated differently under the plan and he cited the example of Lockheed Martin where the Union has negotiated amounts for the employer match that varied from one bargaining unit to the next. Gonzalez said that he would double check the matter and get back to Whitaker. Whitaker asked if Respondent and Power Ford had cut the employer match to the employees' contribution since January 1 and Gonzalez answered that he believed it has and he would get back to Whitaker. After some further discussion Whitaker asked whether Gonzalez would provide the information concerning the 410(k) plan for Power Ford and Respondent by the end of the week, and Gonzalez answered that he would do so. On March 10, Gonzalez provided Whitaker with information concerning the nine bargaining unit employees of Respondent who were participating in the 401(k) program as well as their contributions and Respondent's matching contributions. Gonzalez explained that if Whitaker multiplied the matching contribution by two he would have the amount that would have been paid before January 1 as the employer match.

On March 22 Gonzalez replied to Whitaker's March 7 letter. As it pertained to the 401(k) matter the letter stated:

> As to your request for information regarding the 401(k) match information, I have already previously provided said information for Desert Toyota and I will provide you with similar information for Power Ford Torrance this week.

Gonzalez ended the letter by expressing his willingness to further discuss any remaining issues with Whitaker.

Whitaker and Gonzalez met again for the Power Ford negotiations on March 24. Gonzalez gave Whitaker information concerning the 401(k) for the Power Ford bargaining unit as he earlier had given for Respondent's bargaining unit employees. Whitaker asked if those were all the documents; that he was under the impression that there were amendments to the summary plan description. Gonzalez replied that he understood that the plan description was at the printers. He said that he would check on the matter and when the plan was ready he would send it to Whitaker.[5]

On March 30, Whitaker sent Gonzalez an email message that included Whitaker's complaint that Respondent had made unilateral changes to the 401(k) plan while at the same time refusing to make any economic proposals at the bargaining table. Whitaker insisted that Respondent stop the unilateral changes that it had implemented on January 1.

On April 6, Gonzalez sent Whitaker a letter that set forth in detail his viewpoint of the certain matters, including the 401(k) issue; the letter, as it pertains to that issue, is set forth extensively below.

> Don, I am somewhat concerned that you continue to send communications which appear to be primarily for the purpose of creating a "paper trail" to support positions that you claim we have taken. It's time to set the record straight:
>
> . . . .
>
> (3) With regard to your complaint about the corporate 401(k) Plan, I believe you need to more carefully check the facts:
>
> (a) I first advised you concerning AutoNation's plan to modify one element of the corporate 401(k) Plan in late November 2004, at our negotiating session in Las Vegas.[6] You also showed me at that time, a copy of a November 9 letter to all employees participating in the Plan. As we discussed, the Plan was scheduled for an employer match modification on January 1, 2005.
>
> (b) In late November and December, we met on six separate occasions to continue negotiating the remaining non-economic issues regarding Desert Toyota. During our discussions concerning the Corporate 401(k) Plan, I informed you that the only relevant document was the November 9 letter, which you already had in your possession. After our last December session, there was an additional December 22 letter regarding the Plan, which came out from Corporate Benefits dealing with the same subject. I was not provided a copy of this letter before it was sent to all plan participants nation-wide. I forwarded a copy of this to you in January, as you requested. The only other document that exists is the one page actual amendment to the Summary Plan Description. I have asked for a copy of same and was advised it would be released on Monday, April 11. I will provide you with a copy as soon as I receive it. As I am sure you are aware, however, the amendment will provide you with the same information you already have (i.e., the modification in the match amount).
>
> (c) During our November and December meetings, I told you that the Company would certainly be willing to negotiate about the Corporate 401(k) Plan and its application in the Desert Toyota situation. I also informed you that the plan itself remained essentially the same as it was at the time we began negotiations. On January 28, 2005, you also wrote to me and demanded that "no changes should be made unilaterally until such time as I was afforded the opportunity to review and negotiate over any changes." You had ample time before this letter to review the so-called "changes" during November, December and January. The November 9 letter which you already had in

[5] There is no allegation in the complaint concerning this request for information.

[6] This is an error; as set forth above the notice was given as part of the Power Ford negotiations.

your possession prior to our November meeting, which you showed me at that time, contained the only modification to the corporate 401(k) Plan that could be the topic of your request to review and bargain. This letter clearly stated that the match would be 50% of the first 2% of an employee's eligible compensation, effective January 1, 2005. What other documents could you possibly have been waiting for to (sic) under the Plan modification?

(d) As you are well aware, only 8 (out of potentially 34 or more) bargaining unit members actually participate in the Corporate 401(k) Plan at Desert Toyota. It is not now and never has been a mandatory requirement that employees participate in the Plan. During the summer of 2004, I provided you with a copy of the complete Summary Plan Description for the Plan, as part of our review of our benefits package. We also provided you with additional information, through our Merrill Lynch representative and Kristin Slinkosky, our Corporate 401(k) Manager regarding plan design, fund features, investment data and employee participation processes. As I recall, you asked several questions and requested clarifications, which were provided as part of this review. I also provided you with the information you requested regarding all bargaining unit employees participating in the Plan at Desert Toyota, including employer match information, pursuant to your February 23 letter requesting same.

(e) Although we have discussed the modification in the corporate 401(k) Plan match amount, it is also clear that this modification does not immediately impact any collective bargaining unit employee who actually participates in the Plan at Desert Toyota. Regardless of the January modification, the only time these participants might be impacted would be upon retirement or withdrawal from the Plan. Moreover, each of the eight participants contribute to the Plan at their own voluntary rates and also have the right to make changes to those rates, at any time, pursuant to the provisions of the Plan.

(f) When we last discussed this topic, I told you that we could take any number of possible approaches to address your concerns regarding the 401(k) issue. Here are the options I suggested:

- I told you that we discuss the 401(k) issue at any time and discuss further (sic).
- I told you that depending on the outcome of further negotiations of the total economic package, we might end up with a higher effective employer match than all other AutoNation employee plan participants receive.
- I told you that depending on the parameters of other economic demands and agreements, we might ultimately agree to pay additional monies to make up for any perceived losses in 401(k) employer match contributions, although—given the minimal number of participants within the bargaining unit—this may not be fair to the larger group.
- I also told you that we might also consider making a lump sum payment to certain 401(k) participants, on an individual basis, and I clearly left the door open for any suggestions that you might have on this issue.

(g) You did not appear to want to want to engage in negotiations over this one minor issue. Instead, you simply continued to complain that we did not have the right to "make unilateral changes in the 401(k) plan." Again, we do not believe that the modification of the match amount represents a unilateral change to a material condition of employment for the great majority of bargaining unit employees at Desert Toyota.

(h) Additionally, you have taken the position throughout these negotiations that the IAM Pension Plan included in your initial proposal will be an important part of your economic package. You also made it abundantly clear that your preference for a retirement vehicle would be a union-sponsored defined pension plan, not the Company's 401(k) Plan. At this time we have no idea of the what (sic) the ultimate cost for this would be at Desert Toyota, nor do we know where the parties will end up in regards to agreements regarding wages, bonus plans, insurance and other fringe benefits. It is possible—when everything said (sic) is said and done—that the union might choose to accept a final agreement that has higher wages and inclusion of union-sponsored pension and drop any demands you might have regarding the inclusion of the corporate 401(k) Plan. Under those circumstances, it does not make a lot of sense to take a lot of valuable time to address the minimal issue of the employer match.

However, despite the above my offer to take this issue and discuss out of order still stand and I am more than willing to do this at our next negotiations beginning April 20th.

The exchange of letters continued when on April 11 Whitaker wrote to Gonzalez. Whitaker stated:

> In your April 6, 2005 letter, you have also invented a story regarding some November 9 letter that you state I showed you during the Desert Toyota November 2004 negotiations, and that this communication was addressed to all employees participating in the Company 401(k) Plan. Mr. Gonzalez, this Fairy Tale of yours is a lie, and you know it is untrue. I was not aware of any unilateral changes to the Company 401(k) Plan until you mentioned it to me at our Power Ford Torrance negotiation session of November 30, 2004, and even then your inference regarding this unilateral change was only given to me verbally by you and Regional HR Director Peter Vano. I never discussed this with you before this time, and I have never seen a November 9th communication you refer to in your recreation of the facts.

Whitaker went on to recount the events of November 30 and after as they pertained to the 401(k) matter. He also asked that he be provided with any and all plan documents that "demonstrate the changes from IRS Form 5500, the summary plan description booklet, as well as any other pertinent documentation. I will expect this request to include like information for both Desert Toyota and Power Ford Torrance bargaining units."

At some unspecified time a bargaining unit employee gave Whitaker a document dated April 7 entitled "AutoNation 401(k) Plan Update." The document indicates that the plan was amended on January 1 to change the company match and to allocate certain plan expenses to participants. It indicates that the plan amended effective March 28 to "change the automatic pay-out provisions. There have also been changes in the administrative processes involved in the Plan."[7] The document summarizes all these changes.

On April 22, Respondent presented the Union with its economic proposal. In that proposal Respondent offered to continue to offer its 401(k) plan for bargaining unit employees, subject to the terms and conditions of the plan. As part of its proposal Respondent reserved the right to modify the terms and conditions of the Plan, as needed.

C. Credibility Resolutions

The first major factual issue to be resolved is whether Whitaker had a copy of the November 9 letter by the time of the November 30 meeting. As indicated above, in the April 6 letter Gonzalez contended that Whitaker showed him the November 9 letter at the November 30 meeting. Despite the claim in this letter, at the hearing Gonzalez did not testify that Whitaker showed him the letter at that meeting, nor do his notes for the meeting so indicate. Nor did Gonzalez explain how he came to make that assertion in the April 6 letter. Instead, Gonzalez testified that when he announced that there would be a change in AutoNation's 401(k) plan Whitaker seemed very surprised. Such a reaction by Whitaker is totally inconsistent with the statement Gonzalez later made in the April 6 letter that Whitaker already had the November 9 letter with him at this meeting. I conclude that this assertion was wholly manufactured by Gonzalez to create a basis to support the legal position that it was unnecessary to provide that November 9 letter to the Union because the Union already had it. Despite the fact that Gonzalez' false assertion in the April 6 letter was not made under oath I conclude that it seriously undermines Gonzales' credibility because it shows a propensity to create facts to support a legal theory. In its brief Respondent argues: "According to Gonzalez, Whitaker was aware of a document (dated November 9, 2004) that had been disseminated to Power Ford employees by AutoNation, Inc. regarding the proposed change." To support this assertion Respondent refers to page 191 of the transcript. There Gonzalez testified concerning the November 30 meeting and that after he announced the impending changes to the 401(k) plan Whitaker replied by saying "that in his opinion it was a unilateral change to a material condition of employment. It was something we had to negotiate over and was I aware that there was a prior communication already sent out. And, you know, again, he just reiterated that in his opinion this was a material change that had to be negotiated over. It could not be unilateral and implemented." Earlier, however, Respondent's counsel asked Gonzalez whether anyone at the November 30 meeting indicated that there was a document concerning the 401(k) changes and Gonzalez answered "No." In any event, to the extent that the passing reference to a prior communication can be interpreted as meaning that Whitaker already had seen the November 9 letter, I do not credit Gonzalez' testimony on this point for reasons previously stated as well as his testimonial inconsistency on this point. In a footnote, Respondent contends "In fact, Gonzalez had not even seen the November 9 document until Whitaker showed it to him during the meeting on November 30." In support of these assertions Respondent directs me to pages 189–190 and 216–217 of the transcript. However, nothing whatsoever in those pages of the transcript supports the contention that Whitaker showed the November 9 letter to Gonzalez at the November 30 meeting. Respondent's counsel is reminded that factual assertions made in a brief must accurately refer to evidentiary support in the record.

The next factual dispute is whether Whitaker requested information at the November 30 meeting. Although neither Gonzalez nor Holt admitted that Whitaker requested information at this meeting, Respondent in its brief concedes "Gonzalez agrees that Whitaker told him that he wanted to receive all documents relating to the 401(k) change in match amount." I therefore credit Whitaker's testimony concerning the request for information made at this meeting. Respondent does, however, contend that Whitaker never asked to bargain over the changes in the 401(k) plan. In support of this assertion Respondent vigorously challenges the veracity of a portion of Whitaker's bargaining notes for November 30. In particular, Respondent attacks the note above the "squiggly line" that indicates that Whitaker told Gonzalez that he wanted to receive all documents as soon as possible and that Respondent must negotiate before it could make the changes. Without going into detail, Respondent makes a serious challenge as to whether that portion of the notes was added later as an afterthought. But I find it unnecessary to rely on that portion of the notes to conclude that Whitaker requested bargaining. Above the challenged portion of the notes another note indicates "Told [Gonzalez] should be no change to 401(k) plan until nego." And even more importantly, yet ignored by Respondent in its brief, as quoted in the preceding paragraph Gonzalez admitted that Whitaker demanded to bargain before the changes were made. Accordingly, I conclude that Whitaker requested bargaining before any changes were made to the 401(k) plan.

Next, I need to resolve whether Whitaker requested information during the December 7, 8, and 9 bargaining sessions involving Respondent and the Union. Remember, Whitaker had thus far only requested information at the Power Ford bargaining session on November 30. Whitaker testified on direct that at some point during these negotiations he told Gonzalez that he was as concerned about the 401(k) plan at Respondent as he was at Power Ford and that Gonzalez replied that he understood. Even if credited, this is hardly a clear request for information. On cross, Whitaker claimed that "I was talking to [Gonzalez] about specifically was trying to get the information that I had already requested and that—that obviously AutoNation 401(k) plan—the AutoNation 401(k) plan is, as I understood it, going to create the same problem at Desert Toyota as it did at Power Ford." This testimony, taken literally, makes no sense because Whitaker had been provided the 401(k) plan months before. Although Whitaker took notes at this bargain-

[7] There is no allegation in the complaint concerning these changes.

ing session, the General Counsel did not offer them to corroborate Whitaker's testimony concerning any request for information. I note that in his January 26 letter Whitaker set forth in detail the factual history of this case up to that point; the letter made no reference to any request for information at the December bargaining sessions. Gonzalez and Holt both testified that Whitaker did not raise the 401(k) matter at this meeting; their bargaining notes also make no reference to Whitaker raising this matter at these negotiating sessions. For these reasons I conclude that no request for information was made at the December bargaining sessions.

D. Analysis

1. Refusal to provide information

Upon request, an employer must provide a union with information that is relevant and necessary for the union to perform its obligations as the collective-bargaining representative of the employees. *NLRB v. Acme Die Casting Co.,* 385 U.S. 432 (1967). The information must be provided to the union in a reasonable period of time. *Mary Thompson Hospital,* 296 NLRB 1245, 1250 (1989); *Consolidated Coal Co.,* 307 NLRB 69 (1992).

Before turning to the allegations in the complaint, I address the matter of the November 9 letter. It is important to note that there is no allegation that Respondent unlawfully refused to provide this letter to the Union. Even after the hearing ended the General Counsel did not move to amend the complaint to cover this allegation. In a footnote in his brief the General Counsel states:

> The Complaint alleges only that Respondent delayed in providing the Union with information it requested. However, notwithstanding Gonzalez' letter of April 6, General Counsel did not know that there was a November 9, 2004, letter that Respondent failed to provide the Union. That letter is clearly encompassed by the Union's information request of November 30, 2004, and the Respondent's failure to produce it should be found to be a separate violation.

But the General Counsel fails to address the issue of how he has satisfied his due process burden owed Respondent; I will not undertake that mission for him. Accordingly, I decline the invitation to find that a separate violation concerning the November 9 letter.

The complaint alleges that on November 30 the Union verbally requested all documents pertaining to any proposed changes to the 401(k) plan and that Respondent unlawfully delayed in providing that information until January 25, when Gonzalez mailed the information to Whitaker. Specifically, in his brief the General Counsel argues Respondent unlawfully delayed providing the December 22 letter to the Union. On the one hand, turning over a single document should not take much time. One the other hand, Respondent had to obtain the document from AutoNation. Also, the holidays occurred during delay period. Under these circumstances the delay of about 5 weeks does not rise to the level of an unfair labor practice. *King Soopers, Inc.,* 344 NLRB 838, 840 (2005), cited by the General Counsel, is distinguishable in at two respects. There, the parties had agreed that information requested by the union should be provided in 2 weeks; here, there is no such agreement. There the respondent did not provide all of the information until 14 weeks after the request; here, the delay was about 5 weeks. I shall dismiss this allegation of the complaint.

The complaint next alleges that on January 13 the Union verbally requested all documents pertaining to any changes to the 401(k) plan and that Respondent unlawfully delayed in providing that information until January 25, when Gonzalez mailed the information to Whitaker. I have dismissed the allegation described in the preceding paragraph concerning the December 22 letter. It follows that this allegation too should be dismissed.

The complaint also alleges that on January 26 the Union, by letter, requested that Respondent furnish it with the information described in the preceding two paragraphs that Respondent unlawfully delayed in providing that information until January 25, when Gonzalez mailed the information to Whitaker. Respondent describes this allegation as "frivolous." I agree and shall dismiss it.

Finally, the complaint alleges that on February 23 and March 7, the Union by letter, requested that Respondent provide information concerning the 2005 contributions paid by Respondent to match the employees' contributions to the 401(k) plan and that Respondent unlawfully delayed providing that information until March 24. Here again the delay of about 4 weeks is not so long, without more, to automatically lead to the conclusion that a violation has occurred. As above, Respondent did not possess the information at its own disposal but had to obtain the information from its parent company AutoNation. I shall dismiss these allegations also.

2. Unilateral changes

An employer may not make changes in terms and conditions of employment of unit employees without first giving a union notice and an opportunity to bargain. Generally an employer may implement the changes after bargaining in good faith with the union and after having reached an impasse in the bargaining. *NLRB v. Katz,* 369 U.S. 736 (1962).

The facts show that on January 1, the matching contribution for employees enrolled in the 401(k) plan were reduced. In its brief Respondent concedes that a 401(k) benefit plan is term of employment that generally requires bargaining with a union before it can be changed. Respondent also added fees that employees would have to pay for using the 401(k) plan.[8] I have also concluded that Whitaker insisted that Respondent first bargain with it before it made changes in the 401(k) plan yet Respondent, instead of bargaining with the Union, proceeded nonetheless to change the plan. Normally, these facts would point to a clear violation of the Act. *Lakeside Health Center,* 340 NLRB 397 (2003). Moreover, the plan was changed before Respondent provided the Union with information that it had requested. *Decker Coal Co.,* 301 NLRB 729 (1991).

But Respondent makes several arguments in an effort to escape liability. The first and only argument that I need to ad-

[8] Although alleged in the complaint, the General Counsel, Respondent, and the Union do not mention this matter at all in their briefs. So the issue of assessment of fees against terminated employees, as opposed to employees still working, is not addressed.

dress is that the General Counsel failed to name the proper party as Respondent because it was AutoNation, and not Respondent, that initiated the changes to the 401(k) plan. As the facts show, the bargaining obligation runs to Respondent and not AutoNation. It is also clear that AutoNation made the decision to implement the changes in the plan. Although AutoNation is the parent corporation of Respondent, it is a separate legal entity. Also, there is no allegation in the complaint that Respondent and AutoNation are a single employer and the General Counsel does not argue in his brief that they are. Despite the fact that Respondent clearly indicated that this was an issue at the hearing, the General Counsel in his brief does not address it; he merely equates AutoNation with Respondent. However, it is not so obvious to me why AutoNation and Respondent should simply be considered the same legal entity. In *Exxon Research & Engineering Co.,* 317 NLRB 675 (1995), the judge concluded that the named respondents, all of whom were subsidiaries of a parent corporation who was not named as a respondent, violated Section 8(a)(5) of the Act when unilateral changes were made to a thrift plan. However, the judge declined to order affirmative relief for the violation because he concluded that the named respondents had no power whatsoever to rescind the changes and that such relief required action by the trustees of the plan or by the parent corporation, neither of whom were named in the complaint. The Board affirmed the violation but reversed the judge on the remedy. The Board ordered the named respondents to rescind the changes to the thrift plan, reinstate the previously existing conditions, and make the employees whole. The Board indicated that this was the traditional remedy for unilateral changes and left the matter for compliance, but it did not otherwise give a rationale on this issue. The Board's finding was reversed in *Exxon Research & Engineering Co., v. NLRB,* 89 F.3d 338 (5th Cir. 1996). The Court concluded that the evidence did not show that the named respondents implemented the changes to the thrift plan but rather those changes were implemented by the trustees or the parent corporation who were not named in the complaint. In my view the Board's decision in *Exxon* does not provide a rationale to conclude that Respondent violated the Act concerning the changes made to the 401(k) plan where the evidence is clear that AutoNation, and not Respondent, required that the changes be made and there is no evidence that Respondent had the authority to defy AutoNation on this matter. As indicated above, the General Counsel also fails to articulate a rationale. Under these circumstances I shall dismiss this allegation in the complaint also.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.